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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 SOUTHERN DIVISION
14

15 SHARON COBB, et al., individually
16 and on behalf of all others similarly
situated,

17 Plaintiffs,

18 v.

19 BSH HOME APPLIANCES
20 CORPORATION, a Delaware
Corporation,

21 Defendant.
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23
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25
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Case No. SACV10-711 DOC (ANx)

**CLASS PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
APPEAL BOND**

Date: October 19, 2015
Time: 8:30 a.m.
Place: Courtroom 9D

Judge: Hon. David O. Carter

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 19, 2015 at 8:30 a.m., in the Courtroom of the Honorable David. O. Carter, United States District Judge for the Central District of California, located at 411 West Fourth Street, Room 1053, Santa Ana, California 92701-4516, Plaintiffs Dennis Demereckis, Beverly Gibson, Trish Isabella, and Nancy Wentworth (collectively "Plaintiffs") and their counsel, Eppsteiner & Fiorica Attorneys, LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Levin Fishbein Sedran & Berman ("Class Counsel") will and hereby do move the Court, pursuant to Federal Rule of Appellate Procedure 7, for an order that Bobby Ameen file an appeal bond.

This Motion is based on the accompanying Memorandum of Points and Authorities and all exhibits thereto, the Declaration of Stuart M. Eppsteiner, any supplemental papers filed in reply, the argument of Class Counsel, and all papers and records on file in this matter.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on August 31, 2015. See Declaration of Stuart M. Eppsteiner in Support of Motion for Appeal Bond ("SME Decl.").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On July 27, 2015, after conducting a full fairness hearing and reviewing Class Counsel's detailed time records, this Court approved the class action settlement, and awarded attorneys fees, reimbursement of expenses, and class representative service awards. *Tait v. BSH Home Appliances Corp.*, No. SACV100711DOCANX, 2015 WL 4537463, at *1 (C.D. Cal. July 27, 2015) ("Final Approval Order"). In so ruling, this Court considered and expressly rejected all objections to the settlement asserted by the objectors and held the settlement to be fair adequate and reasonable. *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *9, *15.

Now, having never appeared in this case during its pendency, and having filed boilerplate, and meritless objections to its settlement, one objector, Bobby Ameen ("Ameen"), and his professional objector counsel, Scott Kron, noticed a last-minute appeal of this Court's Final Approval Order. Ameen's appeal will delay distribution of over \$1 million dollars in settlement funds to over 19,000 class members who submitted timely claims and are awaiting settlement money. Moreover, Ameen's appeal is not motivated by the interests of the Class, but solely by the financial self interests of his high school classmate and professional objector counsel, Scott Kron. Plaintiffs' respectfully request this Court order Objector Ameen to post a bond in the amount of \$20,000.¹

II. PROCEDURAL BACKGROUND

On February 27, 2015, Plaintiffs filed their Motion for Attorneys' Fees and Reimbursement of Expenses, and Plaintiffs' Request for Service Awards (ECF# 372) and Motion for Final Approval of Class Action Settlement (ECF# 373) ("Motions"). While the class has approximately 650,000 members, only three of

¹ Plaintiffs reserve the right to seek costs on appeal in excess of this requested bond amount.

1 them timely objected to the Settlement, including Objector Ameen who filed his
 2 objection with the Court on April 30, 2015. ECF# 374. On May 7, 2015, Plaintiffs
 3 sought *ex parte* relief to depose Objector Ameen (ECF# 375) which the court
 4 granted on May 11, 2015 (ECF# 377). Plaintiffs deposed Objector Ameen on May
 5 20, 2015. On May 22, 2015, Plaintiffs filed a single reply brief (ECF# 379) in
 6 support of their Motions. On June 8, 2015, the Court held a Fairness Hearing and
 7 took the Motions under submission. On June 11, 2015, the Court ordered Class
 8 Counsel to submit their detailed time records (ECF# 388) which were duly
 9 submitted under seal on June 17, 2015 (ECF## 391-397). On July 27, 2015 the
 10 Court granted the Motions (ECF # 401), and entered judgment in the case on
 11 August 8, 2015 (ECF# 403). On August 24, 2015, Objector Ameen, through his
 12 counsel Scott Kron, filed a Notice of Appeal. ECF# 404.

13 The Settlement provided for cash payments of \$55 to qualifying claimants.
 14 Following the claims deadline of May 28, 2015, the claims administrator had
 15 received a total of 19,469 claims totaling \$1,070,795.

16 **III. APPELLANT SHOULD BE REQUIRED TO POST A BOND AS A**
 17 **CONDITION OF PROSECUTING HIS APPEAL**

18 Pursuant to Federal Rule of Appellate Procedure 39, an appellant in a civil
 19 case must pay “costs on appeal” to appellees in the event the appeal is dismissed or
 20 if the judgment is affirmed. If there is a finding by the appellate court that the
 21 appeal is frivolous, the appellate court can order the appellant to pay damages, plus
 22 single or double costs. Fed. R. Civ. P. 38; *see also* 28 U.S.C. § 1912. Federal Rule
 23 of Appellate Procedure 7 allows the district court to “ensure payment” of these
 24 costs by “requir[ing] an appellant to file a bond or provide other security in any
 25 form and amount necessary.” Fed. R. App. P. 7 (“Rule 7”).

26 The purpose of an appellate cost bond is “to protect an appellee against the
 27 risk of nonpayment by an unsuccessful appellant.” *Miletak v. Allstate Ins. Co.*, No.
 28 C 06-03778 JW, 2012 WL 3686785, (N.D. Cal. Aug. 27, 2012), at *1 (quoting

1 *Fleury v. Richemont N. Am., Inc.*, No C-05-4522 EMC, 2008 WL 4680033, at *6
 2 (N.D. Cal. Oct. 21, 2008)). In class action cases, an appeal bond is “necessary to
 3 provide some level of security to Lead Plaintiffs who have no assurances that
 4 Appellants have the ability to pay the costs and fees associated with opposing their
 5 appeals.” *In re Nutella Mktg. & Sales Practices*, CIV. A. No. 11-1086 FLW, 2012
 6 WL 6013276 (D.N.J. Nov. 20, 2012). *See also Barnes v. FleetBoston Fin. Corp.*,
 7 2006 U.S. Dist. LEXIS 71072, *4 (D. Mass. Aug. 22, 2006) (“[B]y requiring
 8 objectors to post a bond that would cover the costs of losing the appeal, the burden
 9 of litigating frivolous appeals shifts to them instead of to the class. Posting a bond
 10 sufficient to ensure that the class can recoup the costs of appeal provides the class
 11 with an appropriate incentive to litigate the appeals and establish their lack of merit.
 12 And if the appeal turns out not to be frivolous despite initially appearing so, the
 13 objectors will get almost the entirety of their bond back.”).

14 The authority to impose a bond and to determine its amount falls squarely
 15 within the district court’s discretion. *A&M Records, Inc., v. Napster, Inc.*, 239 F.3d
 16 1004, 1028 (9th Cir. 2001); *see also* (“Rule 7”). This Court retains jurisdiction
 17 “during the pendency of an appeal” to order appeal bonds. *See In Re Advanced*
 18 *Elecs., Inc.*, 283 F. App’x 959, 963 (3rd Cir. 2008) (*quoting Venen v. Sweet*, 758
 19 F.2d 117, 120-21 (3rd Cir. 1985)); *see also* ECF#403 (“Final Judgment”) (“the Court
 20 reserves exclusive jurisdiction as to all matters related to administration,
 21 consummation, enforcement, and interpretation of the Settlement, the Settlement
 22 Agreement, the Final Approval Order and this Final Judgment, including, without
 23 limitation, for the purpose of... (d) ordering any additional discovery regarding
 24 objections to the Settlement and presiding over any motions for appeal bonds.”).
 25 Moreover, “a district court, familiar with the contours of the case appealed, has the
 26 discretion to impose a bond which reflects its determination of the likely outcome
 27 of the appeal.” *Adsani v. Miller*, 139 F. 3d 67, 79 (2d Cir. 1998) (citation omitted).

1 **A. Relevant Factors Support Requiring A Bond**

2 When determining whether a bond should be posted, district courts in the
3 Ninth Circuit consider: (1) the appellant's financial ability to post a bond; (2) the
4 risk that the appellant would not pay the appellees' costs if the appeal loses; and (3)
5 the merits of the appeal. *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 961
6 (9th Cir. 2007). Here, two factors weigh heavily in favor of imposing a bond, while
7 one factor is neutral.²

8 **1. Objector Ameen Can Afford to Post the Bond**

9 Under the first factor, there is nothing to suggest that Objector Ameen and/or
10 his counsel are financially unable to post the bond requested. Objector Ameen
11 owns a successful business in Orange County. SME Decl. Ex. 1 (Ameen Dep. at
12 76:8-11; 85:22-86:4). Ameen also owns at least one single-family home in Orange
13 County located at 24771 Tabuenca, Mission Viejo, CA (Ameen Dep. at 13:17-22;
14 85:3-7) with an estimated value of over \$600,000 and for which Ameen paid
15 \$420,000³. In the absence of evidence submitted with an opposition brief, this
16 factor weighs in favor of imposing a bond. *Miletak*, 2012 U.S. Dist. LEXIS 125426
17 at *5 (absence of objector financial records demonstrating inability to pay bond
18 "weighs in favor of imposing an appeal bond"); *Fleury*, 2008 U.S. Dist. LEXIS
19 88166 at *21 (imposing appeal bond where objector "submitted no financial
20 information to indicate that she is financially unable to post a bond"); *see also In re*
21 *Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 293 (ability to pay bond is
22 "presumed" where objectors do not present evidence that they lack financial ability
23 to post bond).

24 ² Because both Objector Ameen and his counsel reside within this district, this
25 factor is neutral. *Miletak v. Allstate Ins. Co.*, No. C 06-03778 JW, 2012 WL
26 3686785, at *2 (N.D. Cal. Aug. 27, 2012)(finding second factor neutral based on
27 objector's California domicile, but imposing \$60,000 bond based on remaining
28 factors).

³ See http://www.zillow.com/homedetails/24771-Tabuenca-Mission-Viejo-CA-92692/25612691_zpid/ (last visited 9/3/15)

2. Objector Ameen's Appeal is Meritless

Under the third factor, the appeal is meritless. The standard of review of a district court's approval of a class action settlement is for clear abuse of discretion. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 973 (9th Cir. 2009). Such review is "extremely limited" and the court will "affirm if the district judge applies the proper legal standard and his findings of fact are not clearly erroneous." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). The same standards apply with respect to the district court's award of fees and costs to Class counsel. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002).

Objector Ameen objected, *inter alia*, that the attorneys' fees were too high, that the \$55 settlement payment was insufficient, and that the representative plaintiff service awards were too high. ECF# 374. Plaintiffs responded in detail to each of Objector Ameen's objections (ECF#381) and this Court agreed with Plaintiffs, approving the settlement and awarding the request fees, costs, and service awards. *Tait v. BSH Home Appliances Corp.*, No. SACV100711DOCANX, 2015 WL 4537463, at *15 (C.D. Cal. July 27, 2015). Specifically, this Court undertook a comprehensive analysis of all relevant factors and objections and stated that "in light of the significant risks Plaintiffs would face going forward, the Court finds that the settlement is fair, adequate, and reasonable." *Tait*, 2015 WL 4537463, at *9. As to attorneys' fees, the Court held:

The Court believes the requested fee of \$4,188,981.61, which is a negative multiplier of approximately 0.5 of the unadjusted lodestar, adequately takes into account the results achieved for the class. In light of the circumstances of this case - which can fairly be described as hotly contested litigation, spanning five years, including an appeal to the Ninth Circuit and petition for review in the Supreme Court, as

1 well as the policy underlying fee statutes, the Court finds the requested
2 amount of attorneys' fees (\$4,188,981.61) is reasonable.

3 *Tait*, at *14.

4 In addition to lacking any meritorious argument on appeal, Objector Ameen
5 lacks standing to appeal this Court's order awarding attorneys' fees and costs
6 because the settlement benefit will not be impacted in any way by the attorneys' fee
7 award. Article III requires "some actual or threatened injury as a result of the
8 putatively illegal conduct of the defendant ... likely to be redressed by a favorable
9 decision." *Wolford v. Gaekle (In re First Capital Holdings Corp. Fin. Prods. Sec.*
10 *Litig.)*, 33 F.3d 29, 30 (9th Cir. 1994) (finding that these same criteria apply in
11 determining the question of standing on appeal). Objectors lack standing to file a
12 federal appeal unless he can show (i) that he was injured (ii) how the injury could
13 "likely be redressed by a favorable decision" by the federal court. *Id.*, at 30.
14 Indeed, the Ninth Circuit has routinely held that where an objection merely
15 challenges the fee award but does not show how granting the requested relief would
16 benefit the objector, then there is no standing to object. *See id.*; *see also Knisley v.*
17 *Network Assocs., Inc.*, 312 F.3d 1123, 1126 (9th Cir. 2002) (finding lack of standing
18 because objector could not demonstrate how vacating fee award would benefit
19 objector). Moreover, conjectural allegations that a fee award might be collusive or
20 that reducing it might have resulted in a better outcome for the objector cannot meet
21 the constitutional requirement that the injury be "concrete and particularized."
22 *Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1089 (9th Cir. 2011).

23 Compounding the lack of merit is the dismal track record, and financial
24 motivation of serial-objector counsel Scott Kron. As detailed in Plaintiffs'
25 Response to the Objection of Bobby Ameen (ECF# 381), Kron routinely represents
26 his friends, family, law partner, pre-existing business clients or himself as objectors
27 to class action settlements. *Id.* at 2. By his own admission, Kron's objector
28 practice has been largely unsuccessful. ECF# 376-1. Given the absence of facts or

1 authority provided by Ameen’s objection and his counsel’s abysmal track record,
 2 the likelihood of defeat is an almost certainty and an appeal bond is warranted. *In re*
 3 *Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010)
 4 (requiring serial objectors to post appeal bond in part because “professional
 5 objectors undermine the administration of justice by disrupting settlement in the
 6 hopes of extorting a greater share of the settlement for themselves and their
 7 clients”); *In re Wal-Mart Wage & Hour Empl. Practices Litig.*, 2010 U.S. Dist.
 8 LEXIS 21466, *17 (D. Nev. Mar. 8, 2010) (requiring appeal bond after noting that
 9 “Objectors’ counsel have a documented history of filing notices of appeal from
 10 orders approving other class action settlements, and thereafter dismissing said
 11 appeals when they and their clients were compensated by the settling class or
 12 counsel for the settling class”).

13 Lastly, neither Objector Ameen nor his counsel appeared at the fairness
 14 hearing, an additional indication that the objections are not meritorious but are
 15 instead a thinly veiled attempt to extract funds from Class Counsel. *See In re*
 16 *Pharm. Indus. Average Wholesale Price Litig.*, 520 F. Supp. 2d 274, 278 (D. Mass.
 17 2007) (observing that “[n]either the objector nor her counsel appeared at the
 18 hearing to explain the objection” and concluding objector arguments were meritless
 19 and that an appeal bond of \$61,000 was appropriate).

20 **B. The Amount Requested Is Appropriate**

21 If an appeal is filed and ultimately unsuccessful, Plaintiffs will be entitled to
 22 the cost of opposing the appeal. Costs identified in Rule 39(e) of the Federal Rules
 23 of Appellate Procedure⁴ “are among, but not necessarily the only, costs available on
 24 appeal.” *Azizian*, 499 F. 3d at 958. In the context of appellate bonds imposed on
 25 objectors to class actions settlements, district courts in this Circuit have found that

26 ⁴ Costs identified include: (1) the preparation and transmission of the record; (2)
 27 reporter’s transcripts; (3) premiums paid for a supersedeas bond or other bond to
 28 preserve rights pending appeal; and (4) the fee for filing the notice of appeal.
 Fed. R. App. P. 39(e).

1 both post-judgment interest on the cash component of the settlement, as mandated
2 28 U.S.C. Section 1961, and administrative costs incurred “to continue to service
3 and respond to class members’ needs pending the appeal” may properly be included
4 when calculating the appropriate amount for an appellate bond. *See Miletak*, 2012
5 WL 3686785, at *2 (ordering bond of \$60,000 to cover Rule 39(e) costs and
6 administrative costs); *In re Wal-Mart Wage & Hour Emp’t Practices Litig.*, No.
7 2:06-cv-00225-PMP-PAL, 2010 WL 786513, at *1 (D. Nev. Mar. 8, 2010)
8 (ordering each objector to post a \$500,000 bond to cover administrative costs and
9 interest, in addition to costs incurred under Rule 39(e)); *Barnes v. FleetBoston Fin.*
10 *Corp.*, No. 01-10395-NG, 2006 WL 6916834, at *3 (D. Mass. Aug. 22, 2006)
11 (including anticipated interest on cash fund while on appeal in appellate bond
12 calculation).

13 Rule 7 does not require plaintiffs to make “delineated showing of costs for a
14 bond motion.” *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 WL
15 1963063, at *3-5 (D.N.J. Jul. 2, 2007). Instead, in ordering appellate bonds, district
16 courts determine whether the requested amount is sufficient to cover anticipated
17 costs without posing a substantial financial hardship on the appellant. *See In re*
18 *Initial Public Offering Sec. Litig.*, 721 F. Suppl. 2d 210, 214-17 (S.D.N.Y. 2010).
19 Applying this analysis, district courts in this Circuit have routinely determined that
20 for Rule 39(e) costs alone requested amounts between \$5,000 and \$25,000 are
21 appropriate, absent a specific showing of financial hardship by the objector. *See In*
22 *re Wachovia Corp. “Pick-A-Payment” Mortg. Mktg. & Sales Practices Litig.*, No.
23 5:09-md-02015-JF (PSG), 2011 WL 3648508, at *2 (ordering bond for \$15,000 for
24 Rule 39(e) costs); *Miletak*, 2012 WL 3686785, at *2 (ordering bond including
25 \$10,000 for Rule 39(e) costs and \$50,000 for administrative costs); *In re Magsafe*
26 *Apple Power Adapter Litig.*, 2012 WL 2339721, at *2 (finding that a bond of
27 \$25,000 per objector sufficient to cover plaintiffs’ costs on appeal; reducing amount
28 to \$15,000 in light of substantial hardship showing); *Fleury*, 2008 WL 4680033, at

1 *6-7 (granting a request for a \$5,000 appellate bond). The estimate of \$15,000 for
2 Rule 39(e) costs is also consistent with the experience of counsel in other appeals.
3 SME Decl. ¶ 11.

4 Other costs that Plaintiffs will seek when they prevail on appeal include
5 interest on the settlement cash fund due to Class claimants. A reasonable method
6 for calculating the estimated interest on the \$1,070,795 million in cash slated for
7 disbursement in this case would be to use the current applicable interest rate of
8 0.332%⁵ for 24 months, which is a conservative estimate of the length of time it
9 will take to resolve a class action appeal.⁶ This calculation yields estimated interest
10 of \$7,110.⁷

11 Thus, while Plaintiffs would be justified in seeking a bond in excess of
12 \$22,000, Plaintiffs seek only a very modest bond of \$20,000. This amount is
13 sufficient to cover Plaintiffs' hard costs associated with the appeal, is supported by
14 all relevant and controlling case law and should be granted.

15 **IV. CONCLUSION**

16 For the reasons set for above, Plaintiffs respectfully request this Court grant
17 Plaintiffs' motion requiring Objector Ameen to post an appellate bond of at least
18 \$20,000.

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22 ⁵ The applicable interest rate is equal to "the weekly average 1-year constant
23 maturity Treasury yield, as published by the Board of Governors of the Federal
24 Reserve System, for the calendar week preceding the date of the judgment." 28
U.S.C. § 1961. According to the Federal Reserve's website, for the week ended

25 <http://www.federalreserve.gov/releases/h15/data.htm>.

26 ⁶ The Frequently Asked Questions section of the Ninth Circuit's website indicates
27 that decisions on appeals are usually rendered between 15-32 months from when
the appeal is filed. See <http://www.ca9.uscourts.gov/content/faq.php> (Question
Nos. 17 and 18).

28 ⁷ $\$1,070,795 \times .00332 \times 24/12 = \$7,110$

Dated: September 9, 2015

Respectfully submitted,

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/s/ Stuart M. Eppsteiner

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